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# Supreme Court of the United States

OCTOBER TERM, 1943.

No. 342

JACKSONVILLE PAPER COMPANY,
PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable the Supreme Court of the United States:

Jacksonville Paper Company, a corporation, with its principal place of business at Jacksonville, Florida, appellant below, respectfully petitioning shows to the Court:

## STATEMENT OF MATTERS INVOLVED.

The petitioner seeks a review and reversal of the judgment and decree of the Fifth Circuit Court of Appeals adverse to petitioner and now reported ..... F. 2d ..... Also found in the record page 104, *et seq.* In the Court of Appeals

the petitioner sought to set aside and the respondent sought to have enforced an order of the National Labor Relations Board. The Court of Appeals denied the relief sought by petitioner and entered a decree of enforcement (R. 119-120).

The matter arose on a charge (R. 30) filed with the Board March, 1942. Thereupon a complaint (R. 24-29) was filed and served (R. 34) upon petitioner June 26th, 1942. Hearing was had August 24th, 1942, before a trial examiner (Vol. II, p. 6). At the close of the hearing (Vol. II, p. 172) the Board's counsel made certain amendments to the complaint and the charge and also asked leave to amend the pleadings to conform to the proof. Thereupon on the same day an "amended charge" was filed as now appears (Vol. I, pp. 52 and 53).

The amended charge (Vol. I, p. 52) alleged unfair labor practices within the meaning of Section 8 (1) (3) and (5) of the Act

"In that:"

(a) "The Company * * * has by various statements made and acts performed, intimidated its employees with regard to their forming, joining or remaining members of the undersigned labor organization."

(b) "The Company *discharged* employees Henry Sariano on or about January 26, 1942" (and another dismissed at the close of the hearing) "all because of their membership in and activity on behalf of the undersigned labor organization."

(c) "The Company refused to bargain collectively with the undersigned labor organization"

on certain dates named. It is then charged generally

"By these and other acts, the Company has interfered with, restrained and coerced its employees in their rights guaranteed in Section 7 of the said Act."

It will be noted that as to Henry Soriano the charge was solely that he was *discharged* because of labor union activity. No mention was made of any failure or refusal to *hire* or *advance* him to a regular job or position of truck driver or otherwise.

The charge and the amended charge were jurisdictional. The Board had no power to initiate any complaint without a precedent charge. Neither did the Board have power to file or prosecute any complaint which did not conform to the charge. 29 U. S. C. A. 160 (b).

The complaint (Vol. I, pp. 24, 29) as amended (Vol. II, p. 172) attempted to conform to and stay within the charge as amended. There were substantially three charges embodied in the complaint:

First. Sections 6 and 7 (R. 26, 27) allege a refusal to bargain collectively contrary to Section 8 (5) of the Act.

Second. Sections 8 and 9 (R. 27) alleged a *discharge* of Henry Soriano because of union membership and union activity contrary to Section 8 (3) of the Act but there is no allegation of any refusal to hire or to advance to a permanent position.

Third. Section 10 (R. 27) alleges that the company "interfered with, restrained and coerced its employees * * * more specifically by the following acts and conduct."

Certain acts are then alleged in subparagraphs (a) to (e) inclusive but no one of them has to do with any failure to hire or any failure or refusal to advance Henry Soriano to a regular and permanent position of truck driver or otherwise. Sections 10, 12 and 13 of the complaint (R. 28, 29) alleged generally that the acts and doings alleged in previous paragraphs of the complaint constituted a violation of certain sections of the Act.

Thus it appears that neither in the charge nor in the complaint is it anywhere alleged that the petitioner

was guilty of an unfair labor practice by failing or refusing to hire Henry Soriano or by failing or refusing to advance him from the status of a temporary employee to that of a regular and permanent position of truck driver or otherwise. The absence of any such allegation from the charge and from the complaint will become important because all other matters charged against the petitioner-employer were completely exonerated either by the Board or by the Circuit Court of Appeals.

The intermediate report of the trial examiner (Vol. I, p. 59) stated the substance of the supposed unfair labor practices complained of. His statement shows also that he interpreted the pleadings to charge as to Henry Soriano purely a *discharge and a refusal to reinstate* because of his union activity—*not a failure* or refusal *to hire* or a failure or refusal *to advance* him to the status of a regular and permanent position of truck driver or otherwise. At Volume I, page 67, the trial examiner found that the petitioner-employer discharged Henry Soriano on January 24th, 1942, and thereafter failed to reinstate him, all on account of his union membership. Indeed the trial examiner found that petitioner-employer was guilty of all matters charged in the complaint and at Volume I, pages 76, 78, he recommended issuance of a drastic disciplinary order including

> "offer to Henry Soriano immediate and full reinstatement to his *former position as permanent truck driver* or a substantial equivalent position and make him whole for any loss of pay."

The decision and order of the Board (R. 84 to 100) recited (R. 85) the substance of the complaint in substantially the same terms as used by the trial examiner which included an alleged wrongful *discharge* and *refusal to reinstate* Henry Soriano. Under paragraph B (R. 90 to 93) the Board completely exonerated petitioner-employer on the charge of refusing to bargain collectively. That

finding completely eliminated a very large part of the trial examiner's report but the Board did undertake to find (R. 89 to 90) that petitioner had been guilty of interference, restraint and coercion. That alleged finding however was based upon communications to one Aaron, a truck driver, and to one Zink who signed the original charge (R. 31) as business agent for the complaining labor union. In subparagraph C (beginning R. 93) the Board undertook to find that Henry Soriano had been *discharged* as alleged in the complaint because of union activity or union membership but in dealing with the subject of refusing to bargain the Board, in the fourth paragraph (R. 93), said:

> "It is clear that on April 1, the date of the respondent's reply to the Union's letter requesting recognition, the Union no longer represented a majority of the employees. Since it is not shown that the Union suffered a loss of its majority through any unfair labor practice of the respondent, the latter was under no duty to recognize the Union or to bargain with it."

This finding rendered the remainder of the Board's decision highly ambiguous, especially as to the matter of alleged interference, restraint and coercion as well as alleged unfair labor practices affecting Henry Soriano.

The cease and desist order of the Board (R. 98 to 100) was bad because it was entirely too broad in the first place and not warranted either by the charge or the complaint. In the next place as applied to Henry Soriano there were no findings to support or justify an order to reinstate

> "to his former position as permanent truck driver or to a substantially equivalent position"

nor were there any findings to show that any supposed refusal to hire or any supposed failure or refusal to advance Henry Soriano to a permanent job of regular truck driver operated

"to encourage or discourage membership in any labor organization"

or that such dealings with Henry Soriano had

"a coercive effect upon the employee."

Finally, there was no testimony and no findings whatsoever that it was necessary for Henry Soriano to be offered a regular and permanent job as truck driver in order

"to effectuate the policies of the Act."

The opinion of the Court of Appeals (Vol. I, p. 105, *et seq.*) proceeded to analyze the testimony and the inferences drawn therefrom in such a way as to eliminate and nullify every substantial finding which had been made by the Board. The opinion and reasoning of the Court of Appeals likewise eliminated each and every charge made in the complaint. Dealing particularly with Henry Soriano the court pointed out (Vol. I, p. 111, and p. 115) that Soriano destroyed his own testimony by self impeachment, nevertheless the opinion of the court in the last paragraph undertook to save the case of the Board by finding that there was some tangible evidence that petitioner-employer had failed to hire Soriano permanently and give him permanent employment as truck driver because of his union affiliations, whereas the charge as amended and the complaint as amended laid no predicate for any such finding.

One month after the rendition of the opinion the court entered its decree of August 9th, 1943, confirming the cease and desist order which had been entered by the Board. That cease and desist order as entered by the court has all the infirmities which were present in the order as made by the Board.

## BASIS OF JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13th, 1925, now 28 U. S. C. A., Section 347. The opinion and judgment of the Circuit Court of Appeals were filed July 9th, 1943, but the decree of the Court of Appeals directing the enforcement of the Board's order was not entered until August 9th, 1943. Application for stay order was duly filed with the Court of Appeals August 13th, 1943, and the same was duly granted on the same date.

This application for writ of certiorari is also being made pursuant to Rule 38 of this Court.

## QUESTIONS PRESENTED.

### Question I.

CAN THE BOARD FILE A COMPLAINT MAKING SPECIFIC CHARGES AGAINST AN EMPLOYER THEN FAIL COMPLETELY, AS FOUND BY THE COURT, TO SUSTAIN ANY OF THOSE CHARGES, YET BE ENTITLED TO AN ENFORCEMENT ORDER REGARDING A MATTER NOT CHARGED?

STATED OTHERWISE

MUST THE ALLEGATA AND PROBATA COINCIDE AT LEAST AS TO SOME ONE OF THE CHARGES MADE BEFORE THE BOARD CAN BE ENTITLED TO AN ENFORCEABLE ORDER?

29 U. S. C. A., Sec. 160(b), provides:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect."

The case of *NLRB* v. *Hopwood Retinning Co.*, (2 C. C. A.) 98 F. 2d 97, text supporting the 9th and 10th headnotes construed the aforesaid language of the Act and held that charges are jurisdictional. That the Board cannot initiate a complaint without the previous filing of charges. That a respondent employer is entitled to statutory notice of the charge and the complaint. The 10th headnote of the case reads:

> "The complaint issued by the Regional Director under The National Labor Relations Board's rule and the subsequent hearing must be in accord with the charge, in an attempt to prove or rebut such charge. National Labor Relations Act, Sec. 10, 29 U. S. C. A. Sec. 160."

The case of *Aluminum Ore Co.* v. *NLRB*, (7 C. C. A.) 131 F. 2d 485, 6th and 7th headnotes, is to like effect.

In the case of *NLRB* v. *Indiana & M. E. Co.*, decided January 18th, 1943, 87 L. Ed. (adv.) 355, 360, this court among other things said:

> "The Act requires a charge before the Board may issue a complaint * * * When a Board complaint issues, the question is only the truth of its accusations."

Under these authorities it is clear that the Board acquired no jurisdiction to file any complaint not covered by the amended charge (Vol. I, pp. 52 and 53). That charge as construed by the trial examiner (Vol. I, p. 59) and as construed by the Board (Vol. I, p. 85) did not include any complaint as to any failure to hire or any failure or refusal to advance Henry Soriano to a permanent job of regular truck driver or equivalent employment.

**Question II.**

CAN THE BOARD BE ENTITLED TO AN ENFORCEABLE ORDER WHEN ITS FINDINGS ARE INCONSISTENT, CONTRADICTORY AND DESTRUCTIVE OF EACH OTHER?

We have heretofore quoted the finding of the Board (last half p. 93, Vol. I) to the effect that no "unfair labor practices" on the part of the petitioner-employer caused the union to suffer a loss of its majority of employees of petitioner. That finding rendered the other charges (R. 52, 53) moot questions. It was charged that the employer by sundry statements and acts had intimidated its employees

> "in forming, joining or remaining members of the undersigned labor organization."

The finding above referred to destroyed that charge as also the charge of refusing to bargain collectively. The charge as to Henry Soriano was also tied up with the "undersigned labor organization" but if that labor organization lost its majority of the employees through no fault of the petitioner then a failure of the petitioner to advance Henry Soriano to a permanent position of regular truck driver or otherwise, for whatsoever cause, did not operate "to encourage or discourage "membership in the "undersigned labor organization." 29 U. S. C. A., Sec. 158 (3). *Phelps Dodge Corporation* v. *NLRB*, 312 U. S. 177, 185, 2nd headnote. On account of such ambiguity and contradictions in the Board's decision there should in any event have been a reference to the Board for the purpose of clarification. *NLRB* v. *Virginia E. & P. Co.*, 314 U. S. 469, 1st and 2nd headnotes.

**Question III.**

WAS THERE ANY SUBSTANTIAL RELEVANT EVIDENCE TO SUPPORT THE BOARD'S BELIEF (OR FINDING) "THAT SORIANO WAS NOT HIRED PERMANENTLY BECAUSE OF HIS UNION AFFILIATIONS AND THAT HAD IT NOT BEEN FOR HIS UNION AFFILIATIONS HE WOULD HAVE BEEN GIVEN PERMANENT EMPLOYMENT AS A TRUCK DRIVER?"

The last paragraph of the court's opinion (Vol. I, p. 116) answered this question in the affirmative and upon that sole basis the court entered judgment awarding to the Board the enforcement of its order previously made. It is now well settled that the Board has the burden of proving one or more of the charges it makes against an employer. That the evidence to suppport an adverse finding against an employer must be substantial and relevant to the charges made. That to be substantial the evidence must be such as would sustain a verdict rendered by a jury of reasonable men. In the case of *NLRB* v. *Bell Oil & Gas Co.*, 98 F. 2d 870, the Fifth Circuit Court of Appeals in an opinion by Judge Holmes sustained these propositions as shown by the 4th and 5th headnotes. Tested by the foregoing rules the court denied the petition of the Board for an enforcement order holding that the findings of the Board were not sustained by material, competent and relevant evidence. In the case of *NLRB* v. *Sun Shipbuilding & Dry Dock Co.*, 135 F. 2d 15, decided March 31st, 1943, the Third Circuit Court of Appeals adhered to the same rules (see text supporting the 9th, 10th and 11th headnotes). In that case the court quoted from *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229, as follows:

> "The term 'evidence' as used in this connection means 'substantial evidence,' that is, 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"

In the case of *NLRB* v. *Indiana & M. E. Co.*, decided January 18th, 1943, 87 L. Ed. (adv.) 365, text supporting the 7th headnote, the court announced substantially the same rule.

To begin with, the evidence of not hiring Soriano permanently as a regular truck driver and the supposed reason therefor are not material or relevant because no charge of that sort had been filed by the complaining labor union with the Board. Neither was such a charge made by the Board in the complaint filed, notice of which was served upon the employer. In the next place it is not possible to find in the record the requisite substantial evidence to support such a belief and finding as stated in the last paragraph of the court's opinion when consideration is given to all the facts developed, including the self impeachment of Soriano as observed in the court's opinion.

The opinion of the Third Circuit in the Sun Shipbuilding Company case above cited, supporting the 15th and 16th headnotes, emphasizes the necessity of considering the whole record before arriving at conclusions and states among other things:

> "The duty to find facts does not carry with it the prerogative of raising suspicion to status of fact or basing inferences upon mere speculation."

The opinion of the court in this case concedes that Henry Soriano was never discharged. That his status was never anything more than a temporary employee from time to time called by the employer and paid on "extra labor" vouchers. The court also finds from his own testimony that the employer never promised him permanent employment. Also that he impeached himself in several ways when undertaking to testify on that subject, whereas on the other hand the unimpeached witnesses for the petitioner testified that his union membership had nothing to do with the relations between him and the company.

Moreover the undisputed record is that Aaron who was the ring leader among the company's employees in forming the union was never affected by his union membership. He voluntarily quit his job as truck driver in the hope of getting a better job with some other employer but when he failed to obtain it he applied for and was given back his old job as truck driver and this he held until he voluntarily quit a second time to take a better job elsewhere. That is the record (Vol. II, pp. 89 to 93) and such are the findings by the Court of Appeals. If petitioner's treatment of its employees was affected by union membership or union activity, then surely it would have been manifested in the case of the employee Aaron and not as to the casual and from time to time employee Soriano. We may add the following pertinent statements from the last two pages of the court's opinion (Vol. I, pp. 115-116):

> "We find there is no testimony in the record to show that Henry Soriano was ever permanently employed as a truck driver or otherwise."
>
> "His testimony showed that he never was unconditionally promised a regular job."
>
> "There is nothing in the record to show that Soriano was anything other than a temporary employee."

Moreover the record shows that Henry Soriano was re-employed on five different occasions after January 26th, 1942, the date alleged in the complaint as being the date of his supposed discharge. That is to say, he was re-employed on temporary jobs January 28th, January 30th, February 2nd, February 3rd and February 7th, 1942 (See Vol. II, pp. 108 and 109, and Vol. I, bottom p. 94). If Soriano's union membership made any difference to the company then it is utterly unreasonable that they would have re-employed him so many times after it was fully known that he belonged to the union. The record shows no pattern of discrimination whatsoever. *NLRB* v. *Citizen-News Co.*, (9 C. C. A.) 134 F. 2d 970, 4th headnote.

Soriano, as the opinion of the court stated, impeached himself in several particulars. The petitioner's shipping clerk Bauer who was unimpeached specifically denied making the statement attributed to him by Soriano. Bauer's testimony is also undenied to the effect that he tried out Soriano as a truck driver and found him to be too slow on deliveries (Vol. II, p. 141). The rule established by this court in *NLRB* v. *Virginia E. & P. Co.*, 314 U. S. 469, is that the "total activities" of an employer towards its employees, including the one making complaint, must be taken into account before a finding on the subject of coercion and restraint can be deemed appropriate.

**Question IV.**

IS THE CEASE AND DESIST ORDER EMBRACED IN THE COURT'S DECREE CONSISTENT WITH THE COURT'S OPINION OR JUSTIFIED BY THE EVIDENCE?

The Board by its own findings (Vol. I, p. 93) concluded that the complaining labor union had not lost its majority of petitioner's employees through any unfair labor practices of the petitioner. The court's opinion affirmed that finding and conclusion. It clearly follows that no basis remains for paragraph 1 (a) of the decree (Vol. I, p. 119). Moreover, only one labor organization was involved. Therefore the broad scope of paragraph 1 (a) "or any other labor organization" was not justified.

Paragraph 1 (b) of the decree goes still further and undertakes to enjoin and interdict anything the petitioner *might do in the future* that would be a violation of the Act. Such an order on this record cannot be justified. *American Smelting & R. Co.* v. *NLRB*, 126 F. 2d 680, text 688-689, supporting the 17th and 18th headnotes. *NLRB* v. *Cleveland Cliffs Iron Co.*, 133 F. 2d 275, text supporting the 16th and 17th headnotes. *NLRB* v. *J. I. Case Co.*, (7 C. C. A.) 134 F. 2d 70, 7th headnotes. In

the case of *NLRB* v. *Express Pub. Co.*, 312 U. S. 426, 433, this court held that a finding of the violation of the Act in one particular does not justify

> "a blanket order restraining the employer from committing any act in violation of the statute, however unrelated it may be to those charged and found."

On the same subject and on the same page the court further said that the Board has no authority

> "to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

See also the *Phelps Dodge Corporation case*, 313 U. S. 177, holding that the jurisdiction of the Board goes no further than to *neutralize* the Act found to have been in violation of the Act.

**Question V.**

IS PARAGRAPH 2 OF THE CEASE AND DESIST ORDER EMBRACED IN THE DECREE (VOL. I, p. 120) SPECIFICALLY RELATING TO HENRY SORIANO, CONSISTENT WITH THE COURT'S OPINION OR WITH THE RECORD MADE BEFORE THE BOARD?

The opinion (Vol. I, p. 115) among other things said:

> "We find that there is no testimony in the record to show that Henry Soriano was ever permanently employed as a truck driver or otherwise."

Other statements are made in the opinion to like effect, particularly on the last two pages thereof. x How then can the order be justified which requires the petitioner to

> "offer to Henry Soriano immediate and full reinstatement to his *former position* as *permanent truck driver*, or to a substantially equivalent position without prejudice to his seniority or other rights and privileges" (Italics ours).

x See p 12 supra

He had no such "former position" to which he could be reinstated nor did he have any seniority rights. The court distinctly held that he was never a permanent truck driver and never had a permanent job of that sort or otherwise. Is it necessary

"to effectuate the policies of the Act"

that a position permanent in character be *created* for Henry Soriano? Is it necessary to discharge a permanent truck driver to make such a place for Soriano in the dull summer season? The Board's powers are limited to such corrective orders as will effectuate the policies of the Act. The Board has no roving commission. *Southern Steamship Co.* v. *NLRB*, 316 U. S. 31.

Paragraph 2(b) of the decree is not supported by the record because there was no evidence that Soriano did not shortly after February 7th, 1942, secure a more lucrative and a permanent employment. The court will take judicial notice of the Pearl Harbor attack and of the speedy declaration of war and of the speedy establishment of ship yards in all available ports and of the speedy construction of air fields throughout the country, particularly along the coasts of Florida. All this together with other war efforts and a selective draft brought about a shortage of man power and a rapid increase in wages. These known conditions arising early in 1942 created the presumption that Henry Soriano if not drafted secured permanent employment at very much higher wages than 30 cents per hour shown by the "extra labor" vouchers filed in evidence. The fact is (though not in the record) that for several months prior to the hearing of August 24th, 1942, Soriano had been permanently employed at Tampa, Florida, by the Tampa Ship Building Company, at from 60 cents to 80 cents per hour, but, without regard to the actual facts which the Board failed to bring forward, it still remains that having failed to bring forward any evidence to overcome the reasonable presumption above noted the

Board wholly failed to show that Soriano's reinstatement to a permanent position which he never had and to back pay which might have resulted from such a position if he had ever enjoyed it, was necessary to

"effectuate the policies of the Act."

To be consistent with the decision in the Phelps Dodge case, 313 U. S., text 189, there should in any event have been a reference to the Board for the taking of testimony on this matter together with others where the Board failed to carry the burden of proof cast upon it by the pleadings.

## REASONS RELIED ON FOR THE ALLOWANCE OF WRIT OF CERTIORARI.

**1. The judgment and decree of the court of appeals is in conflict with 29 U. S. C. A., Sec. 158, in that there was no substantial material evidence to show that petitioner interfered with, restrained or coerced any of its employees mentioned in the complaint in the exercise of rights guaranteed by Sec. 157 of 29 U. S. C. A.**

**2. The judgment and decree of the court of appeals is contrary to 29 U. S. C. A., Sec. 158(3), in that there was no substantial or material evidence to show that there was any discrimination by the petitioner in the hire or tenure of the employment of Henry Soriano or any other employee which had an effect "to encourage or discourage membership in any labor organization."**

**3. The judgment and decree of the circuit court of appeals was contrary to 29 U. S. C. A., Sec. 160, Sub-Secs. (b) and (c) in that the only evidence found by the court indicating any possible violation of the statute related to a matter not stated in the charge or in the complaint and in that the cease and desist order entered by the board and confirmed by the court was entirely too broad in essential particulars and wholly unjustified by the record.**

**4. The judgment and decree of the circuit court of appeals was in conflict with controlling decisions by this court touching the questions involved.**

*NLRB* v. *Indiana & M. E. Co.*, 87 L. Ed. (adv.) 355 to 360.

*Phelps Dodge Corporation* v. *NLRB*, 313 U. S. 177, 185.

*NLRB* v. *Virginia E. & P. Co.*, 314 U. S. 469, 1st and 2nd headnotes.

*NLRB* v. *Express Pub. Co.*, 312 U. S. 426, 433.

*Southern Steamship Co.* v. *NLRB*, 316 U. S. 31.

**5. The judgment and decree of the circuit court of appeals is in conflict with the decisions of other circuit courts of appeal dealing with similar questions.**

*NLRB* v. *Hopwood Retinning Co.*, (2 C. C. A.) 98 F. 2d 97.

*Aluminum Ore Co.* v. *NLRB*, (7 C. C. A.) 131 F. 2d 485, 6th and 7th headnotes.

*NLRB* v. *Sun Shipbuilding & Dry Dock Co.*, (3 C. C. A.) 135 F. 2d 15, 9th, 10th and 11th headnotes.

*American Smelting & R. Co.* v. *NLRB*, (8 C. C. A.) 126 F. 2d 680, 17th and 18th headnotes.

*NLRB* v. *Cleveland Cliffs Iron Co.*, (6 C. C. A.) 133 F. 2d 295, 16th and 17th headnotes.

*NLRB* v. *J. I. Case Co.*, (7 C. C. A.) 134 F. 2d 70, 7th headnote.

**6. The questions presented by this petition and the accompanying record are of great public importance with respect to the administration and the enforcement of the National Labor Relations Act.**

*NLRB* v. *Indiana M. & E. Co.*, 87 L. Ed. (adv.) 355, 356.

*Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215, 217.

*NLRB* v. *Express Pub. Co.*, 312 U. S. 426, 431.

Wherefore your petition Jacksonville Paper Company respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and send to this court for its review and determination on a day certain to be named therein the full and complete transcript of the record and proceedings had in the case numbered on its docket No. 10571, entitled Jacksonville Paper Company, Petitioner, versus National Labor Relations Board, Respondent, and that the judgment and decree of said United States Circuit Court of Appeals for the Fifth Circuit rendered and entered in said cause be reversed by this Court and that petitioner have such other and further relief in the premises as justice and equity may require and as to the Court may seem meet.

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# In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 342

JACKSONVILLE PAPER COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court below (Vol. I, 104–114)[1] is not yet officially reported. The findings of fact, conclusions of law, and order of the National

[1] The printed record for purposes of the petition for certiorari consists of: (1) the printed "transcript of record" in the court below, containing the complaint, decision of the Board, opinion and decree of the court below, and other papers, which is referred to herein by the designation (Vol. I); and (2) the "transcript of testimony" printed as an appendix to petitioner's brief in the court below, which is referred to herein by the designation (Vol. II).

Labor Relations Board (Vol. I, 84–100) are reported in 46 N. L. R. B. 902.

### JURISDICTION

The decree of the court below (Vol. I, 114–116) was entered on August 9, 1943. The petition for a writ of certiorari was filed on September 10, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

### QUESTION PRESENTED

Whether there is substantial evidence to support the findings of the Board, which were sustained by the court below, that petitioner interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act, and discriminated in regard to the hire and tenure of employment of one Henry Soriano in violation of Section 8 (3) and (1) of the Act.

### STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, p. 9.

### STATEMENT

Upon the usual proceedings, the Board, on January 9, 1943, issued its findings of fact, conclusions of law, and order (Vol. I, 84–100). The

pertinent facts, as found by the Board, and shown by the evidence, may be summarized as follows:[2]

On January 20 or 21, 1942, William Mixson, the manager of petitioner's Miami branch, was visited by a Union[3] representative who requested him to recognize the Union as the bargaining agent of the truck drivers, helpers, and warehouseman employed at this branch (Vol. I, 88; Vol. II, 49–52). On the afternoon of the same day, Mixson interrogated one of the truck drivers about the union campaign and got him to admit that he was a member. Mixson then disparaged the benefits employees could expect to gain from union membership, and characterized the leaders of the Union as a "bunch of racketeers." (Vol. I, 88; Vol. II, 87–88.) About the same time, Supervisor Bauer[4] asked employee Henry Soriano whether he had joined the Union (Vol. I, 88–89; Vol. II, 99). A few days later, Bauer told employee Robert Aaron that Mixson believed him to be one of the "ring leaders" in the Union, and

[2] In the following Statement, the references designated by the symbol (Vol. I), and preceding the semicolon, are to the Board's findings, and the succeeding references, designated by the symbol (Vol. II), are to the supporting evidence.

[3] Motor Transport and Allied Workers, Local No. 400, C. I. O., which at the time had obtained the adherence of 8 of the 9 or 10 eligible employees then employed at Miami by petitioner (Vol. I, 87–88; Vol. II, 43–45, 47, 67–82, 114–115).

[4] Bauer's title was "shipping clerk," but he was admittedly a supervisory employee, having charge of the truck drivers and warehousemen at Miami, and possessing the power to hire and discharge (Vol. I, 88; Vol. II, 12–14, 134).

that certain other employees had been discharged and threatened with discharge because the management considered them "labor agitators" (Vol. I, 89–90; Vol. II, 62–65, 90–91).

The Board found that petitioner, by expressing to its employees hostility to the Union, sought to induce the employees to withdraw from the Union (Vol. I, 89); and further, that petitioner, by disparaging the Union, inquiring whether its employees belonged to it, and by attempting to induce them to withdraw therefrom, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (Vol I, 90).

Henry Soriano was hired by petitioner on or about January 13, 1942, as a part-time worker (Vol. I, 93–94; Vol. II, 102–103). A few days later, Supervisor Bauer gave him a regular assignment as a truck driver and told him that if his work was satisfactory he would be given permanent full-time employment in that capacity (Vol. I, 94; Vol. II, 140, 96). Soriano was assigned to drive a truck previously driven by one Thompson, a regular full-time driver who had, at about this time, left petitioner's employ (Vol. I, 94; Vol. II, 45–46, 95–96, 107). During the week ending January 24, 1942, during which Soriano drove the truck steadily for 56 hours (Vol. I, 94; Vol. II, 47–48, 96, 106–108), his work was not criticized at any time (Vol. I, 95; Vol. II, 101).

On January 20, in the meantime, Soriano had joined the Union (Vol. I, 94; Vol. II, 70, 71). On January 21 (which was either the same day, or the day following that on which the Union requested petitioner to recognize it, *supra,* p. 3), Bauer asked Soriano whether he had become a member of the Union, and the latter replied in the affirmative (Vol. I, 94; Vol. II, 99). A few days later, on January 24, Bauer told Soriano that "business had fallen off a little bit" and that he was therefore going to "lay up" the truck (Vol. I, 94; Vol. II, 96–97). Instead, however, the truck continued to be driven, but by another employee (Vol. I, 94; Vol. II, 149–150). Thereafter, Soriano was returned to intermittent work, including on one occasion, truck driving, until February 7 (Vol. I, 94; Vol. II, 131–132, 46–47). He has not worked for petitioner since that time (Vol. I, 94; Vol. II, 46–47).

On several occasions, Soriano sought an explanation from Bauer and Manager Mixson as to why he had been deprived of regular work as a truck driver, and as to whether he "had a chance to get back on as a steady driver," but these complaints were invariably ignored or evaded (Vol. I, 95; Vol. II, 98). Finally, Bauer declared, "Well, you had your chance to get on steady, but, since you joined the Union, and Mr. McAllister [5]

[5] McAllister was a Conciliator of the United States Department of Labor who was attempting to assist the Union and petitioner to reach an agreement (Vol. I, 91; Vol. II, 52,

called Mr. Mixson and told him that you could not be fired, well, that let you out. You can't get back in steady" (Vol. I, 95; Vol. II, 99).

The Board found that the real reason for denying Soriano steady employment is found in Soriano's admission to Bauer that he had joined the Union, and in Bauer's statement to Soriano that, since the latter had joined the Union, and McAllister had intervened with Mixson in his behalf, Soriano could not "get back in steady" (Vol. I, 96).

Accordingly, the Board found that petitioner had discriminated in regard to the hire and tenure of employment of Henry Soriano, thereby discouraging membership in the Union, and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act (Vol. I, 96).

Upon findings that the petitioner's conduct as above summarized constituted unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (Vol. I, 97–98), the Board ordered petitioner to cease and desist from the unfair labor practices found, from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act, to offer reinstate-

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17). The record does not disclose under what circumstances McAllister made the statement ascribed to him (Vol. I, 95; Vol. II, 21).

ment with back pay to Soriano, and to post appropriate notices (Vol. I, 98–100).

On February 12, 1943, petitioner filed in the court below a petition to review and set aside the Board's order (Vol. I, 1–12); the Board answered, requesting enforcement (Vol. I, 13–18). On July 9, 1943, the court handed down its opinion (Vol. I, 104–113), and on August 9, 1943, entered its decree (Vol. I, 114–116), enforcing the Board's order in full.

## ARGUMENT

Petitioner's contention (Pet. 9–13, 16) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra*, pp. 3–6) affords full support for the challenged findings, as the court below held (Vol. I, 113).

In respect to the contention (Pet. 3–8) that there was a fatal variance between the pleadings and the proof relating to the discrimination against Soriano, the record discloses that at no time during the hearing was there any misunderstanding as to the basis of the Board's complaint, and that all parties to the proceeding knew from the outset that the essence of the complaint was the discrimination against Soriano because of his affiliation with the Union. In fact, nowhere does petitioner assert that such alleged variance resulted in any detriment or disadvantage to it in

meeting the issues. In these circumstances, petitioner's contentions raise no issue reviewable here. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 349–351; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 431–432.

CONCLUSION

The decision below, sustaining the Board's order, is correct, and presents no conflict of decisions or question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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OCTOBER 1943.

## APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.



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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

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## No. 342

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JACKSONVILLE PAPER COMPANY,
*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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## REPLY BRIEF FOR PETITIONER.

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### REPLY BRIEF FOR PETITIONER.

The bits of testimony picked out and stated in the Board's brief, pages 2 to 7, are neutralized and rendered of no consequence by the findings of fact stated in the opinion of the Court of Appeals down to the last paragraph thereof. The opinion is now reported as *Jacksonville Paper Company* v. *N. L. R. B.*, 137 Fed. (2d) 148.

The opinion and the record show that the supposed derogatory statements testified to by Board witnesses but denied by petitioner's witnesses, had no effect on the employee Aaron or any other employee even if such statements were made. Likewise, petitioner's knowledge of Aaron's membership and of Soriano's membership in the union had no effect whatsoever on petitioner's dealings with Aaron, Soriano or any other employee. The Court of Appeals in positive terms so found. Actions speak louder than words. So here the dealings between the petitioner and its employees, including Aaron and Soriano

speak louder and more effectively than the self-impeached statements of Soriano relied upon in the Board's brief.

The Board's brief does not attempt to answer any of the five questions of law presented by the petition filed in this cause save the first question. As to the first question it is claimed that the petitioner was not taken by surprise. The record as interpreted by the trial examiner, Vol. I, p. 59, and as interpreted by the Board, Vol. I, p. 85, shows that throughout the proceedings before the Board there was under consideration a complaint of *discharge* of Henry Soriano on a certain date and not a failure or refusal to hire or reinstate. The effort now made to shift to some other ground is wholly unwarranted by the record and wholly unwarranted by the findings of the Fifth Circuit Court of Appeals. Our analysis of the record, pages 2 to 4 of the Petition filed herein, has not been answered. Neither has Question No. I discussed pages 7 to 8 of the petition.

The Board's brief has not answered or even touched upon Questions II, III, IV or V of the Petition, stated pages 9 to 14 thereof. Neither has any effort been made to answer the force and effect of the authorities cited by us in support of our answers to the said Questions II to V, inclusive.

We now respectfully submit that the reasons assigned for granting writ of certiorari, pages 16 and 17 of the Petition, are still unshaken and that the writ should issue.

Respectfully submitted,

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